FILED
NOV 28 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(14)

No. 04-9728

IN THE
Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

JOINT APPENDIX

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NOVEMBER 28, 2005

Petition For Writ Of Certiorari Filed April 12, 2005.
Certiorari Granted September 27, 2005.

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California Court of Appeal, First Appellate District
Docket Entries

The People v. Samson
Division 1
Case Number A102394

Docket Entries (Register of Actions)

Date	Description	Notes
04/28/2003	Notice of appeal lodged/received (criminal).	
06/17/2003	Notice of record completion received.	
06/18/2003	Record on appeal filed.	c-1-r-5
06/18/2003	Probation report filed.	(1)
06/23/2003	Supplemental record/transcript filed.	r-1 (4-21-03)
07/02/2003	Counsel appointment order filed.	Atty Martin Kassman. (ind)
10/23/2003	Supplemental record/transcript filed.	r-1
10/23/2003	Certificate of county clerk filed.	the proceedings of the afternoon session of 3-20-03 were inadvertently included with the proceedings of 3-19-03 on page 56, line 12 to page 86, line 23/those proceedings are included in this

Date	Description	Notes
		transcript under the correct date of 3-20-03, starting on pg. 28, line 14.
02/17/2004	Appellant's opening brief.	Attorney: Kassman, Martin Party: Samson, Donald
03/22/2004	Respondent notified pursuant to rule 17(a)(2).	
03/23/2004	Respondent's brief.	Attorney: Office of Attorney General Party: The People
05/03/2004	Appellant's reply brief.	Attorney: Kassman, Martin Party: Samson, Donald
05/03/2004	Case fully briefed.	
05/11/2004	Record to court for review.	
05/13/2004	Case on conference list.	311
05/13/2004	Oral argument waiver notice sent.	
05/25/2004	Request for oral argument filed by:	Martin Kassman for appellant
06/16/2004	Calendar notice sent. Calendar date:	07/07/04 @ 9am.
07/07/2004	Cause argued - submission deferred.	appellant attorney filing motion this

Date	Description	Notes
	(See note field.)	week requesting additional briefing per new US Supreme Court decision
07/12/2004	Motion filed.	to file supplemental AOB.
07/12/2004	Order filed.	Aplnt's motion for leave to file supplemental opening brief is granted. Supp. AOB is due 21 days from date of this order. Supp. RB is due 21 days after the filing of supp AOB. Supp. ARB is due 14 days after filing of supp RB.
08/03/2004	Supplemental brief filed by:	aplnt.
08/20/2004	Supplemental brief filed by:	Attorney: Office of Attorney General (supp. ARB to 14 days) Party: The People
09/13/2004	Supplemental brief filed by:	(ARB)Attorney: Kassman, Martin Party: Samson, Donald

Date	Description	Notes
09/13/2004	Cause submitted.	
10/14/2004	Opinion filed.	Trial court is directed to correct the abstract of jdgmt to award dfdt 342 days of sentence credits rather than 339 days, and to forward corrected abstract of jdgmt to Dept. of Corrections. In all other respects, the jdgmt is affirmed.
11/29/2004	Petition for review in Supreme Court received.	appellant
01/12/2005	Petition for review denied in Supreme Court.	petition for review denied without prejudice to any relief sought to which defendant might be entitled after this court determines People v. Black and People v. Towne, the effect of Blakely v. Washington on California law
01/14/2005	Remittitur issued.	
01/14/2005	Case complete.	

Date	Description	Notes
04/26/2005	Filed letter from:	U.S. Supreme Court Washington D.C., dated 4/20/05: petition for certiorari was filed on 4/12/05 and placed on the docket 4/20/05 as No. 04-9728.
10/11/2005	Filed letter from:	US Supreme Court; dated 9/27; motion of petnr to proceed in forma pauperis and the petn for writ of certiorari are granted

Superior Court Docket Entries

SUPERIOR COURT - HALL OF JUSTICE & RECORDS
IN AND FOR THE COUNTY OF SAN MATEO

CASE NO. SC052426 A

PEOPLE VS. DONALD CURTIS SAMSON

JUDGE:	QUENTIN L. KOPP, JUDGE
CLERK:	LIZ LOPEZ
REPORTER:	LINDA SWANNER
2ND CLERK:	NONE
D.A.:	SARAI OBERMEYER
DEFENSE CO:	ERIC LIBERMAN
PROCEEDINGS:	PROBATION REPORT AND SENTENCING

CHARGES: 1. HS 11377(A) W/PC 1203(E)(4) W/PC 1170.12(C)(1) W/PC 667.5(B) W/PC 667.5(B)

DEFENDANT PRESENT IN CUSTODY.

ARGUMENT PRESENTED BY COUNSEL. MATTER SUBMITTED.

DEFENDANT'S MOTION FOR STRIKING A PRIOR DENIED.

DEFENDANT'S MOTION FOR PROBATION DENIED.

PROBATION IS DENIED.

DEFENDANT IS COMMITTED TO THE DEPARTMENT OF CORRECTIONS AS FOLLOWS:

AS TO COUNT 1. VS. HS 11377(A) IMPOSED THE UPPER TERM OF 3 YEAR(S) 0 MONTH(S).

BASE TERM IS DOUBLED PURSUANT TO PC 1170.12(C)(1).

PLUS ENHANCEMENT TO WIT PRIOR NO. 4 AS TO COUNT 1 PURSUANT TO PC 667.5(B) OF 1 YEAR(S) 0 MONTH(S).

DEFENDANT COMMITTED TO DEPARTMENT OF CORRECTIONS FOR THE TOTAL TERM OF 7 YEAR(S) 0 MONTH(S).

CREDIT FOR 227 ACTUAL DAYS SERVED, PLUS 112 DAYS GOOD TIME/WORK TIME PLUS 0 PROGRAM TIME FOR A TOTAL OF 339.

DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF TO BE DELIVERED TO CALIFORNIA STATE PRISON, SAN QUENTIN.

DEFENDANT SHALL PAY A $200.00 RESTITUTION FUND FINE AS MANDATED BY PENAL CODE SECTION 1202.4 PLUS 10% OR $0.00 COLLECTION FEE.

FINE(S) TO BE COLLECTED BY THE DEPARTMENT OF CORRECTIONS.

SENTENCE AS TO ALLEGATION NO. 5 AS TO COUNT 1 STAYED/STRICKEN. REASON: MOTION BY PEOPLE.

NARCOTICS REGISTERED AND PC 1202.45 FEE NOT ADDRESSED BY COUNSEL OR COURT.
ALL ORIGINAL SENTENCE ELEMENTS FOR THIS PROCEEDINGS ENTERED.

ENTERED ON CJIS BY LIZ LOPEZ DATE 4/21/2003.

NOTICE OF APPEAL AND REQUEST PRO APPOINTMENT OF COUNSEL FILED.

Opinion of the Court of Appeal

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,

v.

DONALD CURTIS SAMSON,
Defendant and Appellant.

October 14, 2004

Following denial of defendant's motion to suppress evidence (Pen. Code, § 1538.5) gathered pursuant to a parole search and a trial before a jury, he was found guilty of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The trial court found that defendant committed a charged prior conviction (Pen. Code, § 1170.12, subd. (c)(1)), and served prior prison terms (Pen. Code, § 667.5, subd. (b)).[1] On appeal, he again contests the validity of the parole search, and claims that the trial court erred in its calculation of sentence credits. In a supplemental brief he has complained of the violation of his Sixth Amendment right to a jury trial due to the trial court's imposition of an upper term of imprisonment. We find that the search was lawful pursuant to a condition of defendant's parole, and any violation of his jury trial right by imposition of an upper term was not prejudicial, but the calculation of sentence credits was in error. We therefore direct the trial

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[1] All further statutory references are to the Penal Code.

court to amend the judgment to add three days of sentence credits, but otherwise affirm the judgment.

STATEMENT OF FACTS[2]

On the afternoon of September 6, 2002, Officer Alex Rohleder of the San Bruno Police Department observed "two adults and a little baby walking down the street." One of the adults was defendant, whom Officer Rohleder recognized "from a prior contact." The officer was aware that defendant was on parole and heard from other officers that he "might have a parolee at large warrant." The officer therefore parked his patrol vehicle and "made contact" with defendant.

Officer Rohleder asked defendant if "he had a warrant at that time." Defendant replied, "no, he didn't. He had already taken care of it." Defendant added that he "was in good standing with his parole agent." Rohleder determined that defendant was not subject to a parole warrant, but nevertheless "conducted a parolee search" as he waited for a cover officer. He knew that during a previous contact with South San Francisco officers defendant warned that the police "weren't going to take him back to prison," but neither defendant's conduct nor officer safety caused him to undertake the search. The sole reason for the search, according to Officer Rohleder, was that defendant was "on parole." He explained: "Because it's a condition of his parole. I believe that being [a] parolee, that he needs to make sure he's still obeying the laws. It's a privilege for him to be out here."[3] n3

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[2] Given that appellant has challenged only the propriety of the parole search and the sentence imposed, we will recite only the facts pertinent to the validity of the search, which were presented at the hearing on the motion to suppress.

[3] Appellant's condition of parole stated that he agreed to "search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or (...continued)

Officer Rohleder testified that he does not search all parolees "all the time," but does conduct parole searches "on a regular basis" unless he has "other work to do" or already "dealt with" the parolee. The officer intended to discharge defendant after the parole search "if he had nothing on him illegal."

Officer Rohleder found a cigarette box in defendant's left breast pocket. Inside the box was a plastic baggie that contained methamphetamine. Defendant was immediately placed under arrest.

Officer Rohleder testified that he then asked defendant's companion, Deborah Watson, for permission to search her, and she agreed. Nothing was found in her possession, and she was not detained.

Watson testified for the defense that as she and defendant were walking to a friend's house with her three-year-old son, Officer Rohleder approached and asked defendant "if he had a warrant for his arrest." Defendant did not say anything to the officer. Rohleder told appellant to "put his hands up on the car," and remove his jacket. He searched the jacket, then searched defendant "again a second time." According to Watson, the officer did not ask permission to search her, but rather told her to empty her pockets, and asked if she had any weapons or drugs. Officer Rohleder "went through" Watson's "belongings on the top of the hood of the car," then told her to "go home."

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without cause." "Such conditions are now automatic, and imposed on every parolee." (*People* v. *Lewis* (1999) 74 Cal.App.4th 662, 668.)

DISCUSSION

I. The Validity of the Parole Search.

Defendant argues that the officer did not conduct a valid parole search. He makes a two-pronged argument: First, that the search was not justified by a reasonable "individualized suspicion" of criminal activity; and second, that the search was "arbitrary, capricious and harassing."

Established law contravenes defendant's contention that a parole search must be based upon reasonable suspicion of criminal activity by the parolee. "In *People* v. *Reyes* (1998) 19 Cal.4th 743 [], the court overruled a previous decision, *People* v. *Burgener* (1986) 41 Cal.3d 505, 224 Cal. Rptr. 112 [], and held that an adult parolee subject to a search condition could be searched even if the searching officers did not have a reasonable suspicion that the parolee had violated or was planning to violate either the law or the conditions of parole. Subject to the same proviso from [*In re Tyrell J.* (1994) 8 Cal.4th 68] about arbitrary, capricious, or harassing searches, 'where the search is for a proper purpose, we hold that, even in the absence of particularized suspicion, a search conducted under the auspices of a properly imposed parole search condition does not intrude on any expectation of privacy "society is 'prepared to recognize as legitimate.' " [Citations.]' [Citation.]" (*People* v. *Lewis*, *supra*, 74 Cal.App.4th 662, 667-668; *see also People* v. *Cervantes* (2002) 103 Cal.App.4th 1404, 1407-1408.) Thus, "reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing," and does not exceed the scope of the consent. (*People* v. *Reyes*, *supra*, at p. 752; *see also People* v. *Lewis*, *supra*, at pp. 667-668; *People* v. *Reed* (1994) 23 Cal.App.4th 135, 141; *People* v. *Velasquez* (1993) 21 Cal.App.4th 555, 558.)

Despite defendant's protest that the majority opinion in Reyes "is incorrect" and contrary to the position taken by other courts, "as an intermediate state appellate court, we, of course, are bound by decisions of the California Supreme Court. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal. 2d 450, 455 []; *People* v. *Superior Court* (*Persons*) (1976) 56 Cal. App. 3d 191, 194, 128 Cal. Rptr. 314 [].)" (*People* v. *Zichwic* (2001) 94 Cal.App.4th 944, 952-953; *see also People* v. *Superior Court* (*Moore*) (1996) 50 Cal.App.4th 1202, 1211; *People* v. *Brackett* (1994) 25 Cal.App.4th 488, 501.) We therefore conclude that the parole search of defendant did not require a particularized suspicion of criminal activity. (*People* v. *Zichwic, supra,* at pp. 952-953.)

We turn to defendant's argument that the parole search was "arbitrary, capricious and harassing" under the standard articulated in Reyes. "A search is arbitrary 'when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee.' (*People* v. *Reyes, supra,* 19 Cal.4th at p. 754.) A search is a form of harassment when its motivation is a mere whim or caprice." (*People* v. *Cervantes, supra,* 103 Cal.App.4th 1404, 1408.) "It may be unreasonable ' "if made too often, or at an unreasonable hour, or if unreasonably prolonged." ' [Citation.]" (*People* v. *Zichwic, supra,* 94 Cal.App.4th 944, 951, quoting from *People* v. *Reyes, supra,* at pp. 753-754; *see also People* v. *Bremmer* (1973) 30 Cal. App. 3d 1058, 1062, 106 Cal. Rptr. 797.)

We find nothing arbitrary or capricious in the search. "It is only when the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim of a legitimate law enforcement purpose, e.g., an officer decides on a whim to stop the next red car he or she sees, that a search based on a [parole] search condition is unlawful." (*People* v.

Cervantes, supra, 103 Cal.App.4th 1404, 1408.) Officer Rohleder did not detain defendant indiscriminately or at his whim, but rather recognized him as a parolee, and thought he may be subject to an outstanding "parolee at large warrant." The lawful basis for the search did not dissipate when the officer learned the warrant was not active. Nor was the officer compelled to rely upon "officer safety" to undertake the search.[4] The warrantless search was predicated entirely upon defendant's parole status, not the warrant or the need for officer safety. And a legitimate law enforcement purpose for a parole search was expressed by Officer Rohleder: to determine whether defendant, as a parolee, was "still obeying the laws." If defendant "had nothing on him illegal," the officer intended to release him. The testimony by Officer Rohleder that he customarily searches identified parolees does not demonstrate arbitrariness, and indicates that the search was not conducted by the officer for the purpose of harassment or due to any personal animosity toward defendant. (*People* v. *Reed, supra*, 23 Cal.App.4th 135, 143.) Finally, the record shows that the search was not unreasonable in duration or the circumstances of its execution. We therefore conclude that the search of defendant was lawful.

II. The Calculation of Sentence Credits.

Defendant also argues that he is entitled to "an additional 3 days" of sentence credits, for a total of 342 days. The Attorney General concedes that an error in the calculation of sentence credits was committed, and upon review of the record we agree.

III. The Imposition of an Upper Term.

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[4] In fact, Rohleder discounted officer safety as a reason for the search.

We have granted defendant the opportunity to submit a supplemental brief to present the argument that under the recent United States Supreme Court decision in *Blakely* v. *Washington* (2004) 542 U.S. ___ [159 L. Ed. 2d 403, 124 S. Ct. 2531], (*Blakely*), the trial court erred by imposing an upper term for his possession of methamphetamine conviction without an admission or supporting finding made by the jury beyond a reasonable doubt. He maintains that under the *Blakely* opinion the jury verdict, "standing alone," did not authorize the upper term selected as a sentence choice by the trial court. He adds that, "California's sentencing scheme required the trial court to impose the middle term, unless it justified a departure by reference to factors other than those necessarily found by the jury - just as the Washington statutory scheme involved in *Blakely* required an 'exceptional' sentence to be justified by reference to factors other than those used in computing the standard range sentence." Therefore, he complains that imposition of upper term upon him violated his constitutional rights as defined in *Blakely*.[5]

We first dispose of respondent's contention that defendant "forfeited" any claim of *Blakely* error by failing to "request a jury trial" to determine the existence of a fact that may increase his sentence. "Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner' are waived on appeal if not first raised in the trial court." (*People* v. *Brach* (2002) 95 Cal.App.4th 571, 577; see also *People* v. *Breazell* (2002) 104 Cal.App.4th

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[5] We are of course aware that the effect of *Blakely*, *supra*, 542 U.S. __ [124 S. Ct. 2531], on California sentencing law is already before the California Supreme Court in *People* v. *Black*, review granted July 8, 2004, S126182, and *People* v. *Towne*, review granted June 18, 2004, S125677.

298, 304-305.) According to a fundamental principle of appellate procedure, "with certain exceptions, an appellate court will not consider claims of error that could have been-but were not-raised in the trial court." (*People* v. *Vera* (1997) 15 Cal.4th 269, 275.) " 'An appellate court should not take notice of matters not first presented to and considered by the trial court, where to do so would unfairly permit "one side to press an issue or theory on appeal that was not raised below." [Citation.]' [Citation.]" (*People* v. *Catlin* (2001) 26 Cal.4th 81, 171.) " 'Generally speaking, the rationale underlying the rule requiring objection below as a prerequisite to complaint on appeal regarding some error by the trial court is predicated on the premise that, in its absence, the People would be deprived of the opportunity to cure the defect in the trial court and the defendant would be allowed to gamble on a favorable result-secure in the knowledge that if he did not prevail there, he would be able to prevail on appeal. . . .' [Citation.]" (*People* v. *Zamarron* (1994) 30 Cal.App.4th 865, 870; *see also People* v. *McClellan* (1993) 6 Cal.4th 367, 377.) The waiver doctrine also seeks to "'"encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided . . . ."' [Citation.]" (*People* v. *Peel* (1993) 17 Cal.App.4th 594, 600.)

"The California Supreme Court has repeatedly held" that even "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal." (*People* v. *Rudd* (1998) 63 Cal.App.4th 620, 628, citing *People* v. *Williams* (1997) 16 Cal.4th 153, 250; *People* v. *Padilla* (1995) 11 Cal.4th 891, 971; *People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People* v. *Garceau* (1993) 6 Cal.4th 140, 173-174; *People* v. *McPeters* (1992) 2 Cal.4th 1148, 1174; *People* v. *Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10.) '"'No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the

failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People* v. *Saunders* (1993) 5 Cal.4th 580, 590, fn. omitted; *see also People* v. *Rudd, supra*, at p. 629.)

However, "Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People* v. *Vera, supra*, 15 Cal.4th 269, 276.) Further, failure to object does not prevent correction or vacation of an "unauthorized sentence" on appeal. (In re Birdwell (1996) 50 Cal.App.4th 926, 931.) "An unauthorized sentence is a narrow exception to the requirement that the parties raise their claims in the trial court to preserve the issue for appeal." (*People* v. *Breazell, supra*, 104 Cal.App.4th 298, 304.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People* v. *Scott* (1994) 9 Cal.4th 331, 354; *see also People* v. *Breazell, supra*, at p. 304; *People* v. *McGee* (1993) 15 Cal.App.4th 107, 117.) "Claims involving unauthorized sentences or sentences entered in excess of jurisdiction can be raised at any time." (*People* v. *Andrade* (2002) 100 Cal.App.4th 351, 354; *see also People* v. *Turner* (2002) 96 Cal.App.4th 1409, 1415.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People* v. *Williams* (1999) 77 Cal.App.4th 436, 460.)

In the present case defendant has presented a claim of deprivation of the fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. (*People* v. *Holmes* (1960) 54 Cal.2d 442, 443-444, 5 Cal. Rptr. 871.)

The constitutional challenge raised by defendant is an issue of law that we may decide without reference to the particular sentencing record developed in the trial court. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815.) And if his position is found to have merit, the sentence may not lawfully be imposed under any circumstances without a jury trial, and as an unauthorized component of his disposition may be corrected on appeal despite the lack of an objection in the trial court. (*Ibid.*; *People* v. *Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2; *People* v. *Blackburn* (1999) 72 Cal.App.4th 1520, 1534; *People* v. *Chambers* (1998) 65 Cal.App.4th 819, 823; *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1590; *People* v. *Sexton* (1995) 33 Cal.App.4th 64, 69.) Finally, *Blakely* was decided after defendant was sentenced, and therefore he had no reason to object in the face of previously established law that unfailingly declared a defendant has no constitutional right to a jury trial in connection with the imposition of an upper term of imprisonment. (*See People* v. *Ochoa* (2004) 121 Cal.App.4th 1551, 1565; *People* v. *Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *People* v. *Ramos* (1980) 106 Cal. App. 3d 591, 605-606, 165 Cal. Rptr. 179; *People* v. *Williams* (1980) 103 Cal. App. 3d 507, 510, 163 Cal. Rptr. 169; *People* v. *Betterton* (1979) 93 Cal. App. 3d 406, 410-411, 155 Cal. Rptr. 537; *People* v. *Nelson* (1978) 85 Cal. App. 3d 99, 102-103, 149 Cal. Rptr. 177; *U.S.* v. *Harrison* (8th Cir. 2003) 340 F.3d 497, 500.) We cannot find that he voluntarily and intelligently relinquished a known right, or forfeited his right to object on appeal by failing specifically to raise an objection in a timely fashion. We therefore conclude that defendant has not waived his right to complain of denial of the right to a jury trial under *Blakely*, and despite the lack of an objection below elect to address his constitutional claims on their merits. (*People* v. *Ochoa*, *supra*, at p. 1565; *People* v. *Peck* (1996) 52 Cal.App.4th 351, 362, fn. 5; *see also People* v. *Marshall* (1996) 13 Cal.4th 799, 831-832; *People* v. *Ashmus*, *supra*, 54 Cal.3d 932, 976; *In re Khonsavanh*

S. (1998) 67 Cal.App.4th 532, 537; *People* v. *Williams* (1998) 61 Cal.App.4th 649, 657.)

In *Blakely*, the United States Supreme Court revisited the rule articulated in *Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 490, 147 L. Ed. 2d 435 (*Apprendi*), that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (*Blakely*, *supra*, 124 S. Ct. 2531, 2536, italics added.) At issue in *Blakely* was whether the determinate sentencing procedure in the State of Washington deprived the defendant of his "federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." (*Id.* at p. 2536.) The petitioner entered a guilty plea to second-degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but "no other relevant facts." (*Id.* at pp. 2534-2535.) Under the Washington Criminal Code (§§ 9A.40.030(3); 9A.20.021(1)(b)), second-degree kidnapping was designated a class B felony that carried a maximum statutory sentence of 10 years. (*Blakely*, *supra*, at p. 2535.) The governing Washington sentencing guidelines further limited the presumptive "standard range" to 49-53 months, but authorized the judge to impose a sentence above the specified range, although below the 10-year maximum, upon a finding by a preponderance of the evidence of "substantial and compelling reasons justifying an exceptional sentence." (*Ibid.*, citing Wash. Rev. Code § 9.94A.120(2)). At the sentencing proceeding, an "exceptional sentence" of 90 months was imposed, based upon the trial judge's finding that the petitioner used "deliberate cruelty" in the commission of the offense, which was one of the

statutorily enumerated grounds for departure from the standard sentencing range. (*Blakely*, *supra*, at p. 2535.)[6]

The court in *Blakely* reaffirmed the commitment articulated in its prior decisions in *Apprendi*, *supra*, 530 U.S. 466, and *Ring* v. *Arizona* (2002) 536 U.S. 584, 153 L. Ed. 2d 556, "to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." (*Blakely*, *supra*, 124 S. Ct. 2531, 2538-2539.) The Sixth Amendment, declared the court, "is not a limitation on judicial power, but a reservation of jury power." (Id., at p. 2540.) The court further observed that "*Apprendi* carries out this design by ensuring that the judges' authority to sentence derives wholly from the jury's verdict." (*Id.*, at p. 2539.)

The court in *Blakely* operated from the essential conclusion reached in both its *Apprendi* and *Ring* decisions that a defendant's constitutional rights have been violated when a judge "imposes a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi*, *supra*, at 491-497, 120 S. Ct. 2348; *Ring*, *supra*, at 603-609, 122 S. Ct. 2428." (*Blakely*, *supra*, 124 S. Ct. 2531, 2537.) The notion advocated by the State in *Blakely* "that there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b)," and "no exceptional sentence may exceed that limit," was

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[6] Under the Washington Sentencing Reform Act, the factors that may be relied upon to justify a finding of an exceptional sentence are listed, but the list is illustrative not exhaustive. A factor may be taken into consideration to impose an exceptional sentence only if it is not already taken into account in the calculation of the standard range sentence for the offense. (*Blakely*, *supra*, 124 S. Ct. 2531, 2535.)

rejected as contrary to those "clear" precedents. (*Blakely, supra*, 124 S. Ct. 2531, 2537.) Instead, the court defined "the 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid*; *see also United State*[illegible] v. *Ameline* (9th Cir. 2004) 376 F.3d 967, 975.)

The court then concluded: "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense,' [citation], which in this case included the elements of second-degree kidnapping and the use of a firearm, *see* §§ 9.94A. 320, 9.94A.310(3)(b). Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. *See* § 9.94A.210(4). The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." (*Blakely, supra*, 124 S. Ct. 2531, 2537-2538, fn. omitted.) "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here), it remains the case that

the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Blakely*, *supra*, at p. 2538.) "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence." (*Blakely*, *supra*, at p. 2538, fn. 8.)

Without deciding that defendant's constitutional rights pursuant to the *Blakely* opinion were violated, we find that he did not suffer prejudice from the imposition of the upper term upon him without a separate finding by the jury of aggravating circumstances beyond a reasonable doubt. We do not, as defendant urges, consider the denial of *Blakely* jury trial rights during sentencing proceedings to be of such fundamental, structural magnitude to require reversal "without regard to prejudice." And we conclude under a harmless error analysis that defendant would have been sentenced to an upper term even without the trial court's finding of any aggravating factors in violation of *Blakely*.

In *Arizona* v. *Fulminante* (1991) 499 U.S. 279, 113 L. Ed. 2d 302, "a majority of the high court, in discussing the applicable harmless error standard for constitutional errors, distinguished 'trial error,' that is, an error which 'occurs during the presentation of the case to the jury,' from 'structural defects,' such as denial of a public trial, which 'affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.' The former errors are subject to *Chapman* analysis (*see Chapman* v. *California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 710-711, 87 S. Ct. 824, 24 A.L.R.3d 1065] [error or deprivation must be shown harmless beyond reasonable doubt]), whereas the latter errors are deemed

reversible per se." (*People* v. *Woodward* (1992) 4 Cal.4th 376, 387.) "There is ~~a strong~~ presumption any error falls within the [former] category, and it is the rare case in which a constitutional violation will not be subject to harmless error analysis." (*People* v. *Marshall*, *supra*, 13 Cal.4th 799, 851.) "In only a few cases has the Supreme Court found a constitutional violation which is not subject to harmless error analysis." (*People* v. *Evans* (1998) 62 Cal.App.4th 186, 194.)

The United States Supreme Court has " 'recognized that "most constitutional errors can be harmless." [Citation.] "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." [Citation.] Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." ' " (*People* v. *Scott* (2001) 91 Cal.App.4th 1197, 1210, citing *Johnson* v. *United States* (1997) 520 U.S. 461, 468, 137 L. Ed. 2d 718 [].) " 'The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.' " (*People* v. *Flood* (1998) 18 Cal.4th 470, 492, citing *Rose* v. *Clark* (1986) 478 U.S. 570, 579, 92 L. Ed. 2d 460.)

We recognize that where ~~the right~~ to a jury trial is " 'altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.' [Citation.]" (*People* v. *Avila* (1995) 35 Cal.App.4th 642, 656, fn. omitted; see also *People* v. *Collins* (2001) 26 Cal.4th 297, 312-313.) "Where demonstration of prejudice

is ' "a practical impossibility, prejudice must necessarily be implied." ' [Citation.]" (*People* v. *Molina* (2000) 82 Cal.App.4th 1329, 1333.)

But here, the denial of the rights to a jury trial to proof beyond a reasonable doubt are only associated with the finding of one or perhaps two among many aggravating circumstances that contributed to the selection of the upper term, not the structure of the trial itself that resulted in the guilty verdict and imposition of sentence. Defendant was tried and found guilty by a fairly selected, impartial jury. He was represented by counsel and received a full opportunity to elicit evidence and offer argument to an impartial judge to support imposition of a middle or lower term. Placed in context, the lack of a jury finding of an aggravating circumstance does not rise to the level of an error that automatically requires reversal of an otherwise valid sentence. (*See Rose* v. *Clark*, *supra*, 478 U.S. 570, 579; *People* v. *Evans*, *supra*, 62 Cal.App.4th 186, 197.) The nature of the error also permits a quantitative assessment of prejudice in the context of the evidence presented in order to determine whether the error was harmless. (*Arizona* v. *Fulminante*, *supra*, 499 U.S. 279, 307-308; *People* v. *Marshall*, *supra*, 13 Cal.4th 799, 851.) We find that any sentencing error under *Blakely* is not a structural defect that demands automatic reversal. (*See People* v. *Epps* (2001) 25 Cal.4th 19, 29; *People* v. *Vera*, *supra*, 15 Cal.4th 269, 278; *People* v. *Marshall*, *supra*, at pp. 851-852.) Rather, we follow the standard of review for federal constitutional errors (*Chapman* v. *California*, *supra*, 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the verdict. (*People* v. *Neal* (2003) 31 Cal.4th 63, 86; *People* v. *Carter* (2003) 30 Cal.4th 1166, 1221-1222; *People* v. *Sengpadychith* (2001) 26 Cal.4th 316, 326.)

Our review of the record discloses that to impose the upper term upon defendant the trial court properly relied upon numerous aggravating factors that do not fall within the reach of the right to a jury trial articulated in *Blakely*. Defendant's record of prior offenses, including multiple crimes of violence, is lengthy and unrelenting. As aggravating factors to support the sentence choice, the court cited - in addition to lack of remorse and failure to take advantage of treatment programs - defendant's "record of prior convictions, some of which involve violent conduct; his prior service of prison terms; his lack of satisfactory performance while on parole;" and his "prior conduct while on parole, including five parole violations." No mitigating factors were cited by the court or mentioned in the probation report.

The aggravating factors that relate to defendant's prior convictions and other recidivist conduct did not implicate his right to a jury trial under the current state of the law. In *Apprendi* the court specifically declared that based on its prior decision in *Almendarez-Torres* v. *United States* (1998) 523 U.S. 224, 140 L. Ed. 2d 350, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. 466, 490, italics added; *see also People* v. *Taylor* (2004) 118 Cal.App.4th 11, 28; *People* v. *Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817, 831; *People* v. *Lee* (2003) 111 Cal.App.4th 1310, 1314.) Thus, "by its terms, the holding of *Apprendi* does not apply to 'the fact of a prior conviction . . . .' [Citation.]" (*People* v. *Taylor*, *supra*, at p. 28.) "*Apprendi* was absolutely clear in excepting the fact of prior convictions from its new rule." (*Thompson* v. *Superior Court* (2001) 91 Cal.App.4th 144, 154.)

Nothing articulated in the *Blakely* opinion casts doubt upon the exclusion in *Apprendi* of prior conviction allegations from the constitutional right to jury trial, and

the California Supreme Court has steadfastly declared that neither the federal nor state constitutions confer the right to have a jury determine any factual issues relating to prior convictions alleged for purposes of sentencing enhancement. (*People* v. *Epps*, *supra*, 25 Cal.4th 19, 23; *People* v. *Kelii* (1999) 21 Cal.4th 452, 455; *People* v. *Vera*, *supra*, 15 Cal.4th 269, 277; *People* v. *Wiley* (1995) 9 Cal.4th 580, 585; *People* v. *McGee* (2004) 115 Cal.App.4th 819, 828.) Even in the aftermath of *Apprendi* our high court held: "The right, if any, to a jury trial of prior conviction allegations derives from sections 1025 and 1158, not from the state or federal Constitution." (*People* v. *Epps*, *supra*, at p. 23; *see also People* v. *Belmares* (2003) 106 Cal.App.4th 19, 27.)

The exception has also been found to apply not only to the fact of a prior conviction, but to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People* v. *Thomas* (2001) 91 Cal.App.4th 212, 223; *see also People* v. *Taylor*, *supra*, 118 Cal.App.4th 11, 28-29.) A narrow reading of the *Apprendi* language to apply to nothing more than the "fact of a prior conviction" fails to consider the bases for the exception, and "takes that language out of its context." (*People* v. *Thomas*, *supra*, at p. 216.) A reason for the exemption of prior convictions from the scope of the jury trial requirement for increased sentences, explained the court, is that "procedural safeguards attached to any 'fact' of prior conviction." (*Apprendi*, *supra*, 530 U.S. 466, 488; *see also People* v. *Lee*, *supra*, 111 Cal.App.4th 1310, 1314.) The court further emphasized that the fact of a prior conviction " 'does not relate to the commission of the offense.' " (*Apprendi*, *supra*, at pp. 488, 496, quoting *Almendarez-Torres* v. *United States*, *supra*, 523 U.S. 224, 230, 244; *see also People* v. *Taylor*, *supra*, at p. 29.) And finally, the court "excepted the fact of a prior conviction from this holding, because of the long tradition allowing sentencing judges to consider the defendant's recidivism." (*People* v. *Bowden* (2002) 102 Cal.App.4th 387, 392, italics

omitted; *see also Jones* v. *United States* (1999) 526 U.S. 227, 249, 143 L. Ed. 2d 311.) "Recidivism 'is as typical a sentencing factor as one might imagine.' " (*Castillo* v. *United States* (2000) 530 U.S. 120, 126, 147 L. Ed. 2d 94.)

"Courts have construed Apprendi as requiring a jury trial except as to matters relating to 'recidivism. ' Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism.' [Citations.] Appellate courts have held that *Apprendi* does not require full due process treatment to recidivism allegations which involved elements merely beyond the fact of conviction itself." (*People* v. *Thomas*, *supra*, 91 Cal.App.4th 212, 221-222; *see also People* v. *Belmares*, *supra*, 106 Cal.App.4th 19, 27-28.)

Thus, in *People* v. *Thomas*, *supra*, 91 Cal.App.4th 212, the court concluded that under *Apprendi* the defendant was not entitled to a jury trial on two prior prison term allegations. Following an analysis of *Apprendi* and its predecessor *Almendarez-Torres* v. *United States*, *supra*, 523 U.S. 224, 226, the court declared: "With the foregoing legal analysis in mind, we reach the following conclusions. In terms of recidivism findings that enhance a sentence and are unrelated to the elements of a crime, *Almendarez-Torres* is the controlling due process authority. *Almendarez-Torres* does not require full due process treatment of an issue of recidivism which enhances a sentence and is unrelated to an element of a crime. *Apprendi* did not overrule *Almendarez-Torres*. The language relied upon by defendant in *Apprendi*, 'other than the fact of a prior conviction,' refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations." (Id., at pp. 222-223; *see also People* v. *Taylor*, *supra*, 118 Cal.App.4th 11, 28-29.)

We similarly conclude that the trial court in the case before us did not violate defendant's jury trial rights by finding aggravating circumstances based upon his recidivism. Defendant's prior prison terms and performance on parole arose out of his prior convictions previously found by the trier of fact or admitted by him, may be established by review of court records, and did not relate to commission of the current offense. Therefore, the aggravating circumstances relating to defendant's recidivism were properly relied upon by the court to impose an upper term without affording defendant the right to a jury trial. (*People* v. *George* (2004) 122 Cal.App.4th 419 [Sept. 15, 2004, D.A.R. 11568, 11573.) We further conclude that defendant's prior convictions, prison terms, and poor performance on parole justified the selection of an upper term, which we are convinced the trial court certainly would have imposed even without finding any facts that require a jury trial under *Blakely*. "California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term . . . ." (*People* v. *Brown* (2000) 83 Cal.App.4th 1037, 1043.) Here, a multitude of aggravating circumstances established by persuasive evidence were not offset by any mitigating circumstances. Thus, even if the trial court erred in finding aggravating factors, the decision to impose the upper term was constitutionally valid and not prejudicial to defendant. (*See People* v. *Burbine* (2003) 106 Cal.App.4th 1250, 1263-1264; *People* v. *Williams* (1996) 46 Cal.App.4th 1767, 1782-1783.)

DISPOSITION

Accordingly, the trial court is directed to correct the abstract of judgment to award defendant 342 days of sentence credits rather than 339 days, and to forward the corrected abstract of judgment to the Department of Corrections. In all other respects the judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.
Margulies, J.

Order of Supreme Court of California

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DONALD CURTIS SAMSON, Defendant and Appellant

Petition for review denied without prejudice to any relief to which defendant might be entitled after this court determines in *People* v. *Black*, S126182, and *People* v. *Towne*, S125677, the effect of *Blakely* v. *Washington* (2004) __ U.S. __ 124 S.Ct. 2531, on California law.

GEORGE

Chief Justice

FILED

JAN 12 2005

Frederick K. Ohlrich Clerk

Proceedings on Motion to Suppress

TESTIMONY OF ALEX ROHLEDER
[Page 20]

DIRECT EXAMINATION

BY MS. OBERMEYER: Thank you.

Q Officer Rohleder, am I pronouncing your name, correctly?

A Yes ma'am.

Q How are you employed?

A I'm a police officer with the City of San Bruno.

Q How long have you been so employed?

A Approximately four years.

Q Were you on duty on September 6th, 2002, at approximately 5:34 pm, in the area of Angus and Mastick in San Bruno, here in County of San Mateo?

A Yes I was.

Q What happened at that date and time?

A I made contact with actually two adults and a little baby walking down the street.

Q Do you see one of those adults in Court here today?

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A Yes I do.

Q Could you identify that person for the record by where that person is seated, what he's wearing?

A He's seated second to left. He's wearing the orange jump suit and short hair.

THE COURT: The record will reflect the identification of the defendant.

MS. OBERMEYER: Thank you.

Q What brought your attention to the defendant on that date and time?

A The defendant himself?

Q What about the defendant got your attention?

A I recognized him from a prior contact. And I was under the impression that he might have a parolee at large warrant.

Q Okay. Were you aware that he was on parole?

A Yes.

Q What did you do?

A I made contact with him.

Q And how did you do that?

A I parked my patrol vehicle across the street and I asked if I could speak with him.

Q And what happened?

A They stopped. And I asked him, if he had a warrant at that time. He told me, no, he didn't. He had already taken care of it. And he was released from

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custody.

Q All right. And did you discuss his status of whether or not he was on parole?

A Yes I did.

Q What did he say?

A He said, he was. And he was in good standing with his parole agent.

Q All right. He stated, he was a parolee?

A Yes.

Q What did you do?

A Identified who I was with the lady and him. Called it in, his name and date of birth. I waited for a cover officer. And at that time I conducted a parolee search.

Q And when you called it in, did you receive any information?

A Yes. They told me he was currently on parole.

Q And then, that lead to you conducting the parole search?

A Yes.

Q And what, if anything, did you find in searching the defendant?

A A cigarette box in his left breast pocket.

Q And what, if anything, was in the cigarette box?

A Inside the box was a plastic baggy containing

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Methampnetamine.

Q All right. Now did you bring to Court today the suspected narcotics?

A Yes I did.

THE COURT: We're not here for decisions on whether or not to hold him to answer, are we?

MS. OBERMEYER: No we're not, Your Honor.

THE COURT: And Mr. Lieberman, I take it, you're willing, for purposes of this motion, to stipulate that the item referred to by the Officer being Methamphetamine, was, in fact, Methamphetamine?

MR. LIEBERMAN: For purposes of this hearing only.

MS. OBERMEYER: I do Your Honor.

THE COURT: Okay.

Anything else on that issue?

I don't want to restrict your evidentiary usage of it, if it has some relevant on some other issue. But on whether or not there was controlled substance, it sounds like, that that's not really an issue here at this point?

MS. OBERMEYER: No. I understand what the Court is stating as to the substance was, in fact, Methamphetamine. However, we do have the substance

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here in the Court today to introduce it, if the Court feels it's necessary for hearing.

THE COURT: I've seen enough Methamphetamine, I don't need to see another sample of it.

MS. OBERMEYER: Then people have no further questions of this witness at this—

THE COURT: Cross-examine, Counsel?

CROSS-EXAMINATION

BY MR. LIEBERMAN:

Q Good morning.

A Good morning.

Q Were you out actively looking for Mr. Samson on the day of this contact?

A No I was not.

Q Okay. You just happened to run across him and recognize him?

A Yes I did.

Q What was the nature of the prior contact that gave rise to your recognition?

A I don't understand the question.

Q You say, you recognized him from a prior contact?

A Yes.

THE COURT: What was the prior contact?

(Talking over one another).

THE WITNESS: South San Francisco Police

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Department had arrested him. I believe it was an incident on his girlfriend. I don't want to say, stalking, but I believe it was an incident with his girlfriend.

MR. LIEBERMAN: Okay.

Q And did you make any attempts to check his status, warrants, or otherwise in your police car before making contact with Mr. Samson?

A I do not believe so. I do not believe so.

Q Do you have the ability to do so?

A In my car?

Q Yes.

A Yes I do.

Q Okay. So why wouldn't you do that, seeing somebody you recognize to be in your mind a parolee at large?

A What wouldn't I check? Because exactly that, he's a parolee at large.

Q You did call for back up before contacting Mr. Samson?

A I told him, I was out with two subjects and they automatically send me cover.

Q Okay. And why were you under the impression that there was parolee at large warrant for Mr. Samson?

A There was some officers that were talking about it. I believe they were attempting to search the

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warrant on Montgomery, his old residence Montgomery.

Q When did that conversation tell you?

A I couldn't tell you. It's just police, police talk.

Q But, but you realize now, of course, that simply was incorrect and there wasn't the parolee at large?

A That is correct.

THE COURT: Excuse me. It's not clear to me. You told us earlier, that the defendant was asked by, something to the effect, if he had a warrant. And he said to you, he took care of it. And then he was released from custody.

THE WITNESS: Yes.

THE COURT: Which implies, suggests to me, I was inferring from that, that in fact, there was a warrant for his arrest, parole warrant, but it had been resolved by him somehow earlier.

Is that your understanding what he was telling you?

THE WITNESS: Yes Your Honor.

THE COURT: In fact, there was an arrest parole warrant, you, that had been taken care?

THE WITNESS: That's what happened.

THE COURT: You ultimately learned that from the defendant?

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THE WITNESS: Yes.

THE COURT: Just to make sure I understood that.

MR. LIEBERMAN:

Q Looking into this matter of the warrant, but you determined there wasn't a warrant, isn't it true, you found out he just finished serving 10 months term for CDC?

A I cannot recall how long he said he served.

Q Just been released from serving the sentence?

A Yes.

Q Is it possible the information you had about a warrant was as much as up to a year old?

A No idea.

Q Okay. It wasn't any fresh information, was it?

A Just when I work, police work, there's several different things to look for. And when I see in my community, when I saw him, I recognized him as a parolee. I recognized in my head, he possibly had a warrant. That's why I got out of my car to see if he did or did not.

I went to investigate if he had one. I did not arrest him on that warrant.

Q You don't necessarily presume all parolees that you know, have warrants, though, do you?

A No I didn't, don't.

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Q The first thing you asked him about was the warrant, correct?

A Yes.

Q And you told him it clear, correct?

A Yes.

Q And you checked that out yourself, correct?

A Yes.

Q And you nonetheless decided to search him, is that correct?

A That is correct.

Q Okay. How come?

A Okay. Because he's on parole.

Q Okay. Search him merely because you could, in other words?

A Because it's a condition of his parole. I believe that being parolee, that he needs to make sure he's still obeying the laws. It's a privilege for him to be out here.

Q Okay. So your training or personal opinion—

(Talking over one another).

MS. OBERMEYER: Objection. Argumentative.

THE COURT: It's irrelevant. Sustained.

MR. LIEBERMAN: Okay.

Q Do you search all parolees on sight, when you see them?

MS. OBERMEYER: Objection. Irrelevant.

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MR. LIEBERMAN: That is relevant.

THE COURT: Say what? Mr. Lieberman, I don't remember asking him what your response was.

MR. LIEBERMAN: That's why I stopped talking.

THE COURT: That a boy.

No. I could see some possible potential relevance. Overruled.

Your question, again?

MR. LIEBERMAN:

Q Do you search all parolees on sight, when you make contact with them?

A It depends.

Q On what?

A If I contact a parolee or if I just drive by one.

Q Well, if you just drive by one?

A If I drive by one and I already dealt with him earlier in the day or have dealt with him, I just drive by. I have other work to do. I don't go after everybody all the time.

Q What if you're driving by a parolee earlier in the day, stop, and talk to them for community safe, safety purposes?

A Community policing to get him to talk to me, so he knows—

Q What are you automatically search—

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(Talking over one another)

Q It's not automatically. Upon condition of him giving me consent or based on his parole.

A Mr. Samson didn't give you a permission to search?

A No he did not.

MR. LIEBERMAN: Okay.

THE COURT: Was, what was the old call for, do you know? Did you know then?

THE WITNESS: I believe it was domestic violence issue.

THE COURT: Next question. Next question.

MR. LIEBERMAN:

Q The contact you had with him prior, gave rise to recognition, were there any threats to police officers, police?

A That he made toward me?

Q Toward any officers.

THE COURT: When are we talking about? When he was searched?

MR. LIEBERMAN: No initial.

THE COURT: South City?

MR. LIEBERMAN: That gave the ability to recognize—

(Talking over one another).

THE COURT: Oh—

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THE WITNESS: I believe South San Francisco said there were.

MR. LIEBERMAN:

Q Was that in your consciousness when you decided to search Mr. Donald—

A I think officer safety is always in my—

Q You didn't search him for officer safety?

A No. I searched him for parole search.

Q Right. There was something, nothing he was doing while walking along the street, that otherwise gave you probable cause to search him, is that correct?

A No.

Q Didn't appear to be under the influence of controlled substance or anything like that?

A I wasn't able to determine that, because of your defendant.

Q Because of?

A He wouldn't let me.

Q Okay. When you first saw him, though, he was not doing anything to you that appeared to be illegal or inappropriate, is that correct?

A He was just walking down the street.

Q Okay. He was walking with a woman who had a baby?

A Yes.

Q Okay. You searched her, as well, is that

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Correct?

A Yes I did.

Q Why is that?

A I asked her for consent.

Q Why did you do that?

MS. OBERMEYER: Objection. Relevance.

THE COURT: Mr. Lieberman?

MR. LIEBERMAN: My belief is, that he searched him, her, merely because she was walking with Mr. Samson, as the court is aware.

THE COURT: Well—

MR. LIEBERMAN: I'm—

(Talking over one another).

THE COURT: Ground—

MR. LIEBERMAN: I'm addressing the motion on the entire contents of the stop. How the people were treated,

potentially, goes to the issue that's the heart of this motion.

THE COURT: Given the fact that at this point the witness says, she consented, I'll sustain the objection.

Next Question.

MR. LIEBERMAN:

Q So she consented to a search, correct?

A Yes sir.

Q Okay. And you've indicated that it is not your

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regular practice to search all parolers, true?

A I still, again, I don't understand your question.

When you come through, that if I've, I'm out and a parolee, you're asking me, if I search everybody?

Q Yes. Well, when you stop a parolee, do you search everyone that's with him?

MS. OBERMEYER: Objection. Relevance.

THE COURT: Sustained.

MR. LIEBERMAN:

Q How long a period of time past from the time you found out there was no warrant for Mr. Samson until you decided to search him?

A I believe I waited for my cover officer.

Q Okay. Can you tell me how long a period time past?

A I couldn't be able to tell you, honestly.

Q Was it more than two minutes?

A No.

Q More than 10?

A I don't think so.

THE COURT: What did you understand the circumstances of the contract in south San Francisco that you were aware of that involved suppose threats to officers? What did you understand that to be?

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THE WITNESS: That he wouldn't be going back to prison.

THE COURT: He made statements, that in a sense, wasn't going to be taken alive?

THE WITNESS: Police weren't going to take him back to prison.

THE COURT: And you were aware of that when you had this contact that's the subject of this motion?

THE WITNESS: Yes. I was aware of the last time.

THE COURT: When you had the contact that's the subject of this motion to suppress. Okay. The one in San Bruno here with the girlfriend, apparently? With me so far?

THE WITNESS: No. Because we're talking about two incidents.

THE COURT: I know. I'm trying to set the stage here. At the time you searched him and found the methamphetamine —

THE WITNESS: Okay.

THE COURT: That lead to the arrest that's this prosecution —

THE WITNESS: Okay.

THE COURT: At that point, were you, was it in your mind that the defendant had this apparent, this

attitude towards the police when he said, he wasn't going to be taken back to prison?

THE WITNESS: Yes. I recall him being the person that said that.

THE COURT: Okay. That's all I needed to know. Thank you.

MR. LIEBERMAN?

MR. LIEBERMAN:

Q Have any personal animosity to Mr. Samson?

A Not at all.

Q Have an argument with him that day?

A No.

MR. LIEBERMAN: If the court will just give me a moment?

THE COURT: Sure.

MR. LIEBERMAN:

Q Once you determined there was no warrant, did you consider letting him go along his way?

A After a parole search, if he had nothing on him illegal.

Q But again, you wouldn't necessarily search every parolee under those circumstances, would you?

A In four years I've dealt with many parolees, many people on contacts, many people on contacts. I can't tell you if I done it on everybody.

I can tell you regular basis, person, parolee

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or person subject to search and seizure, I would search them.

Q Your first call in was 19-10,1066, is that right?

A That is correct.

Q A suspicious person?

A The code, if I'm going without with a person, anybody, 1066, if I would make a traffic stop, it would be 1186.

Q So just a human being gives rise to 1066 A, I'm unclear if you're making contact with just an individual, that's 1066?

A It's my understanding because of radio traffic, you, I would, my officer orders, I'm going out with this subject, because on parole, and I think re parole warrants, it's to cut traffic on the radio in case of emergency for officer, other officers.

THE COURT: It's a cryptic way of saying, you're contacting somebody that might be a problem, right?

THE WITNESS: No necessarily a person, just, I'm contacting someone. So they know where I'm at in case there's a problem.

THE COURT: You don't give the details. Obviously want to minimize jabbering on the radio, right?

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THE WITNESS: That is correct. Your honor.

THE COURT: Okay. Thank you. Next question.

MR. LIEBERMAN: Nothing further at this time.

THE COURT: Redirect?

MS. OBERMEYER: No your honor.

THE COURT: You may step down officer. Thank you.

THE WITNESS: Thank you.

THE COURT: Good luck in your career.

* * *

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TESTIMONY OF BERNARD MARTINEZ

DIRECT EXAMINATION

BY MS. OBERMEYER:

Q MR. MARTINEZ, by whom are you employed?

A Department of, California Department of Corrections. Department of Parole Division. .

Q What is your position?

A Parole Agent.

Q How long have you been so employed?

A For a year.

Q All right. On September 6th, 2002, were you the parole agent for Donald Samson?

A Yes.

Q And do you see Mr. Sampson here in court today?

A Yes.

Q Could you identify him for the record, where he's seated, and what he's wearing?

A Seated next to the officer, wearing orange.

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THE COURT: Record will reflect the identification of the defendant. he's the only one in the courtroom wearing orange.

MS. OBERMEYER: Thank you your honor.

Q As a condition of parole — strike that.

On September 6th, 2002, was the defendant on parole?

A Yes he was.

Q Okay. And as a condition of parole, did he have a search condition?

A Yes he did.

Q And what was that search condition?

A May be searched at anytime by parole officer, law enforcement officer, without cause, with or without a search warrant at anytime, night or day.

Q All right. And did you bring with you today the notice of conditions of parole?

A Yes I did.

MS. OBERMEYER: May I approach the witness, your honor?

THE COURT: You may.

MS. OBERMEYER: Thank you.

THE COURT: You're welcome.

MS. OBERMEYER: I'm having marked as People's 3, a document note and condition of the parole.

THE COURT: Is this the original copy?

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THE WITNESS: It's a copy.

THE COURT: Okay.

Have you seen it, Mr. Lieberman?

MR. LIEBERMAN: I have not.

THE COURT: You will in a minute.

MS. OBERMEYER: I'm showing Mr. Lieberman Exhibit 3.

MR. LIEBERMAN: Thank you, your honor.

MS. OBERMEYER: You're welcome.

THE DEFENDANT: No, it's not.

(Whereupon People's Exhibit 3 was marked for identification only).

MS. OBERMEYER: Thank you.

Q Mr. Martinez, were you the custodian of this record that's been marked Exhibit 3?

A Yes.

Q And was it made and kept in the normal course of business?

A Yes.

Q Is it made or kept near the time when an event occurs?

A Yes.

Q Um, now I'm showing you People's Exhibit 3. Does it set forth the search condition?

A Yes.

Q Could you read it, please?

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A You've agreed to search and seizure by a parole officer or other peace officer at any time of the night or day, with or without a search warrant or with or without cause.

MS. OBERMEYER: Thank you.

People would move People's 3 into evidence at this time.

THE COURT: Any objection, Mr. Lieberman?

MR. LIEBERMAN: It's not the original. I object as hearsay.

THE COURT: Overruled. Be permitted. As you know, hearsay is permitted in a motion to suppress and it sounds like it's — let me back up. I take it that's an exact copy of are original in the file?

THE WITNESS: Yes.

THE COURT: Okay. What is he on parole for?

THE WITNESS: For failing, failure to appear.

THE COURT: Well, that's usually a misdemeanor.

What is the felony that he is convicted of that causes him to be on parole?

THE WITNESS: Possession of a firearm, ex-felon.

THE COURT: 12021?

THE WITNESS: Yes.

THE COURT: Okay. Anything else from the people?

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(Whereupon People's Exhibit 3 was marked and entered into evidence).

MS. OBERMEYER: No your honor.

THE COURT: Cross-examine Mr. Lieberman?

CROSS EXAMINATION

BY MR. LIEBERMAN: Hi. How you doing?

Q Now is Mr. Samson's signature on that form?

A Yes it appears to be.

Q How do you know? You don't know, correct?

A Do I know?

Q That form was purportedly signed in 1999, correct?

A Yes, looks like.

Q You've been his parole agent for a year?

A No.

Q How long have you been a parole agent?

A Approximately five months.

Q Okay. That, so that form is not signed in your presence, correct?

A No it wasn't.

Q Nor do you know if that's his signature, correct?

A No I don't.

Q Okay. And you've been a parole agent for five months. when you were first assigned this case, he was in custody?

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A Yes.

Q Recently finished 10 months time for violation?

A That is correct.

Q When was he released?

THE COURT: We're going to take a five minute recess. Actually, eight minutes, to 20 after, so the witness can review his file and be able to answer all those questions.

MR. LIEBERMAN: Thank you.

MS. OBERMEYER: Thank you, your honor.

(Break).

THE COURT: Back on the record in the matter of People versus Samson.

Witness is on the stand again and Mr. Lieberman.

MR. LIEBERMAN:

Q I believe the question was, when was he last released from CDC?

THE COURT: And you answer?

THE WITNESS: September 2001.

MR. LIEBERMAN: September of 2001.

THE WITNESS: Yes. That's—

THE COURT: Released from parole, released on parole from his initial sentence or released—

THE WITNESS: From violation.

MR. LIEBERMAN:

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Q You indicated to me, you've been his parole agent for five months. When you first became his parole agent, he was in custody?

A He was, he's been passed around so many times. I believe he was, no, he was, he was not in custody. I'm sorry.

Q When you first met him?

A Yes.

Q When was that?

A That was in April.

Q Of?

A 2002.

Q 2002. How many times have you met Mr. Samson?

A I would say oh, three, four times.

Q Okay. And from April 2002 through September of 2002, there were never any warrants on him, is that correct?

A Yes. There was a warrant.

Q When was that warrant?

A On 6/21/02.

Q A warrant issued?

A Yes.

Q He was ultimately placed on, in custody on that warrant, correct?

A Yes.

Q When?

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A On the 6/24/02, he was arrested in the office.

Q Okay. Did he surrender on his warrant?

A Yes.

Q You arrested him?

A Yes.

Q Okay. So he hadn't been released since September of 2001. So you, okay. But you arrested him in June of '02, correct?

A That is correct.

Q On that warrant.

How long was he placed in custody?

A He was released on 8/28/02.

MR. LIEBERMAN: Okay. No further questions.

THE COURT: Redirect?

MS. OBERMEYER: No your honor.

THE COURT: May the witness be excused?

MS. OBERMEYER: Yes.

THE COURT: From the People's perspective?

MS. OBERMEYER: Yes.

THE COURT: Any objection, Mr. Lieberman?

MR. LIEBERMAN: No objection.

THE COURT: Good luck in your career, Mr. Martinez.

* * *

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TESTIMONY OF DEBORAH WATSON

DIRECT EXAMINATION

BY MR. LIEBERMAN: Q. Good morning, ma'am.

A: Good morning.

Q. Do you know this gentlemen sitting to my left?

A. Yes.

Q. And can you — and for the record, can you tell me what he's wearing and what his name is?

A. His name is Donald Samson. He is wearing orange.

Q. Were you with Mr. Samson on September 6?

A. Yes, I was.

Q. Okay. What were the two of you doing?

A. We were on our way down walking towards one of our friend's house, and we were going to go

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borrow one of his friends car to go shopping with my son, Jefferson, which is three years old.

Q. Okay. Remember about what time of day this was?

A. This is probably like around 4:30, around five o'clock.

Q. Okay. And what happened while you were walking with Mr. Samson and your son?

A. We were walking down towards West Angus which is towards — past in front of Artichoke Joe's. We were approached by Officer Alex and another officer with a canine. He, Officer Alex, had come up to both of us asking Donald if he had a warrant for his arrest.

Q. Let me stop you then. When you saw Officer Alex—do you see him in the courtroom?

A. Yes, I do.

Q. Okay. And do you know his full name?

A. I don't know how to pronounce his last name.

Q. Okay. Can you tell me where you see Officer Alex?

A. Right in front of me.

Q. Okay. I would ask the record to reflect right in front of you. Directly in front of you?

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A. Yes.

Q. Okay. I would ask the record to reflect identification of Officer Rohleder?

THE COURT: It will.

MR. LIEBERMAN: Thank you. The officer walked up to you or —

THE WITNESS: He parked his car next to us, and then he got out of his car.

THE COURT: Ma'am, he asked you one simple question, and all you have to do is answer. If there is

anything that needs to be solicited, he will ask you. Okay?

THE WITNESS: Okay.

MR. LIEBERMAN:

Q. Take your time. You speak kind of fast, and it's hard for the court reporter.

A. Okay.

Q. And what was said upon his walking up to you?

A. He said: "Aren't you Donald Samson? Don't you have a warrant for your arrest for domestic violence?

Q. Did Mr. Samson answer?

A. He replied: "What?" Like hesitated, surprised.

Q. What happened next, ma'am?

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A. He had told him to put his hands up on the car and gave him a search.

Q. Okay. Did Mr. Samson comply—

A. Yes.

Q. —with his order?

A. Yes. He did not refuse.

Q. Okay. Did the officer have any contact with his car after that initial search?

A. Excuse me?

Q. Did the officer go to his patrol car after that initial search?

A. I wasn't paying attention to that, no. I was busy attending to my son that was next to me, standing next to me.

Q. Okay. What happened then after he searched Mr. Samson?

A. He told him to take his jacket off, and he threw his coat on top of the hood, and then he had searched his jacket, and then he searched him again a second time, and then he had asked me to stand aside and wait right there with my child.

Q. Did you comply with the officer's request?

A. Yes.

Q. What happened after he was done searching — after he was done searching

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Mr. Sampson again?

A. After I saw Donald, after that he went straight to the police car, after that he had approached me and asked me where we were coming from, where were we going and asked me: What was I doing? He asked me if he was my boyfriend.

Q. Did you answer these questions?

A. Yes, I did, I answered these questions.

Q. Did he say or do anything else to you?

A. He had told me to empty my pockets out. No, he did not ask me for permission. He just told me to empty my pockets out and if I had any weapons or any drugs on me.

Q. Did you empty your pockets?

A. Yes, I did.

Q. Where did you empty your pockets?

A. On the top of the hood of his car.

Q. He told you? He did not ask your permission?

A. No, he had not asked permission. He told my son to step aside and sit on the ground while this was happening, and my son was also crying while this thing was going on.

Q. Your son is how old?

A. Three.

Q. Your son listened to the officer,

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correct?

A. Yes, he did.

Q. So, you emptied your pockets. He asked you some personal questions about whether or not you had a relationship with Mr. Samson; is that correct?

A. Yes.

Q. Are you a girlfriend of Mr. Samson's?

A. No.

Q. What happened after that?

A. Um, that's it. He went through my belongings on the top of the hood of the car and told me to go ahead and proceed to what I was doing, to go ahead with my son, go home.

Q. And did you go home?

A. No. I went to the store to get my son some ice cream.

Q. How do you feel the officer treated you during this contact?

A. I would say he treated me so and so like I was—like I was a criminal. He made me feel like I was—like I did something wrong, like I was a bad guy because I was with my friend. That's how he made me feel.

Q. He didn't physically abuse you?

A. No, he didn't physically abuse me.

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Q. Was he polite to you?

A. Kind of—not really. Kind of like he had a little attitude, but he wasn't really, really very, very cruel.

Q. Did you have any attitude towards him?

A. No.

Q. Okay. Did you comply completely with all his requests and demands?

A. Yes.

Q. One moment please.

MR. LIEBERMAN: No further questions at this time.

THE COURT: Any cross-examination, Miss Obermeyer?

MS. OBERMEYER: Yes, your Honor, briefly.

CROSS-EXAMINATION

BY MS. OBERMEYER: Q: Good morning, Miss Watson.

A. Good morning.

Q. How long have you known the defendant, Mr. Samson?

A. I've known him for at least five years.

Q. And how did you first meet him?

A. I met him through my cousin. His cousin

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is his neighbor.

Q. What did you say, you're friends?

A. Yes.

Q. Would you say you're close friends?

A. Yes.

Q. Were you ever romantically involved with him?

A. No.

Q. Now, you say that you were just walking on the street with Mr. Samson; is that correct?

A. Yes.

Q. And he — that is Officer Rohleder spoke to Mr. Samson; isn't that correct?

A. Yes.

Q. And Officer Rohleder asked whether or not there was an outstanding warrant, isn't that correct?

A. Yes. If he had a warrant, yes.

Q. And Officer Rohleder was—strike that. The defendant, Mr. Samson, acknowledged he was on parole; wasn't that correct?

A. No. He did not say nothing.

Q. You never heard him say that; is that

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correct?

A. No, he didn't say nothing at all to the officer.

Q. Officer Rohleder stated that the defendant was on parole, didn't he?

A. Well, yeah. He said that he was, but no words came out of Donald's mouth at all.

Q. So your testimony is that Mr. Samson never said a word to Officer Rohleder; is that your testimony?

A. Uh-huh. Yes.

Q. Now, Officer Rohleder never threatened you in any way with physical harm, did he?

A. No.

Q. Officer Rohleder didn't push you, did he?

A. Push me? No.

MS. OBERMEYER: Thank you. I have no further questions at this time.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. LIEBERMAN: Q: Were you in a position to hear everything that would have been said between the two of them?

A. Not when he was set in the police car,

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no, and pulled away from me.

Q. Okay. Could you see if there were any conversations going on in the police car?

A. No, I wasn't really paying attention at that time because I had my son that was standing next to me — my three-year-old son and most my of attention went off and on between both of them so . . .

Q. Was your son crying the whole time?

A. Yes. He was crying on the ground while I was emptying my pockets on the hood of the car. My son was crying and he wanted to stand next to me but officer—the officer would not let him come close to me while I was

emptying out my pockets. He wanted my son to be set aside.

THE COURT: Miss Samson, I told you—now this is the third time that I told you, and I'm telling you that there was just a question asked. Only answer it. You have been volunteering which goes to your credibility in this case.

Okay. So if you do it again I'll have do something to you. Understood?

THE WITNESS: Uh-huh.

THE COURT: Is that a yes?

THE WITNESS: Yes.

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THE COURT: Next question.

MR. LIEBERMAN: Q. Did you ask the officer if you could go to your son?

A. No.

Mr. LIEBERMAN: Nothing further.

THE COURT: Any recross?

RECROSS EXAMINATION

BY MS. OBERMEYER: Q. Miss Watson, you'd do what you can to help Mr. Samson, your friend, isn't that correct?

A. Not really. I'm just showing my point of view what I saw and what happened that day.

MS. OBERMEYER: Thank you.

THE COURT: Step outside with that device, sir, and turn it off and you can return.

PERSON FROM THE AUDIENCE: It's off. I apologize for that.

MR. LIEBERMAN: Did the Court get the last question?

THE COURT: No.

MR. LIEBERMAN: Q. Would you be likely to help Mr. Samson?

A. No, I wouldn't.

MR. LIEBERMAN: Nothing further, Judge.

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THE COURT: Hold on, ma'am. Anything else for the People?

MS. OBERMEYER: No. Thank you, Your Honor.

THE COURT: May she be excused, Mr. Lieberman?

MR. LIEBERMAN: Yes, Judge.

THE COURT: Miss Obermeyer, is she free to go?

MS. OBERMEYER: She is.

* * *

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THE COURT: Thank you.

The Court has reviewed the evidence and has heard the tape recording, reviewed the documents filed herein and observed the demeanor and assessing it, the Court finds as follows, that the defendant was on parole subject to search and seizure. That the officer had a basis in his mind to stop the defendant, while erroneous, it wasn't arbitrary or capricious. The act of searching him

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was within his power given the nature of the defendant's parole offense, namely, ex-felon in possession of a firearm

and was certainly prudent to make the search, not only for the protection, itself, but to make sure that parolee is not in violation of the law, which, as it turns out, he was finding dope, and I don't find that his actions were capricious or arbitrary, and therefore, I deny the motion based upon the credibility and evidence of the witnesses.

* * *

Trial Testimony

Testimony of Officer Rohleder

DIRECT EXAMINATION

[Page 81]

Q All right. An finally People's Exhibit 2F what does that photo show?

A This is the same sidewalk that we've been talking about in the last three photos, but it's taken from the angle on the exact opposite of this street, so you're seeing the southwest side.

Q All right. And how would you describe what kind of area People's Exhibit 2A through F shows?

A I'd say it's a right on the border of a business slash residential area.

Q What kind of businesses as well as other kind of buildings are there?

A Okay. Just west of this is going to be San Mateo Avenue which is our main downtown district which all the stores are, there's a 7-Eleven here, right across the street from the casino, along this side is a long parking lot and on the east side of the parking lot is all residential area.

Q All right. And is this a through wear between

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the stores of San Mateo Avenue and then the residential area?

A I'd say it's one of our busiest areas in the city.

Q All right. And when you say residential, are those family homes?

A Yes.

Q And is there a school in the area?

A There is a school, approximately four—four blocks, at least of this area here.

* * *

CROSS EXAMINATION

[Page 88]

Q Prior to Officer Guldner arriving, did you conduct just a limited pat-down?

A Yes, I'm sure I did, for weapons.

Q Okay. And for the jury's benefit, a pat-down search is different than a full-blow search; is that correct?

A That's correct.

Q Okay. Describe what a pat-down search is to

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me, please.

A I would just generally pat down his pockets, waistband behind maybe his jacket right here.

Q And that's done, is it not, just to make sure the person doesn't have any weapons or something like that?

A For my safety, yes.

Q Okay. So you did conduct that very limited search before Officer Guldner arrived?

A A pat-down, yes.

Q Okay. You didn't find any weapons; correct?

A No, I did not.

Q And the drugs—you've testified in court, you didn't find them during that pat-down search; is that also correct?

A That's correct.

* * *